Supreme Court of the United States

October Term, 1978
No. 77-1802

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

CHARLES S. ARMS and ELIZABETH P. ARMS,
Petitioners,
vs.
WILLIAM W. WATSON, LOUIS W. HILL, JR.,
HARRY L. HOLTZ, JOSEPH S. MICALLEF,
Trustees of the Great Northern Iron Ore Properties Trust
and
BURLINGTON NORTHERN INC.,
Respondents.

REPLY OF ARMS PETITIONERS
In Support of Certiorari
To the Supreme Court of Minnesota

THOMAS V. KOYKKA
WILLIAM S. BURTON
ARTER & HADDEN
1144 Union Commerce Building
Cleveland, Ohio 44115
216-696-1144

JAMES R. OPPENHEIMER
MARK H. STROMWALL
OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY
W-1781 First National
Bank Building
St. Paul, Minnesota 55101
612-227-7271
Counsel for Petitioners
Charles S. Arms and
Elizabeth P. Arms

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It will not do for Respondent Burlington Northern to pretend this is a Minnesota land law case.

The railroad cannot so disguise the fact that at this very moment it is hauling Mesabi ore to market, or that in that ore the railroad has a direct interest.

The railroad's position spells clear defiance of the prohibitions of the Commodities Clause of the Hepburn Act.

Or, if it does not, then every railroad in the land is free of those restraints.

That is the problem this case brings to this Court.

The key to decision is in the opinion of the earlier Mr. Justice White, speaking for a unanimous Court in *New*

York, New Haven and Hartford Railroad Company v. Interstate Commerce Commission (1906), 200 U.S. 361. That case did not involve the Hepburn Act—the case arose prior to that statute. But, just as the Commodities Clause of the Hepburn Act in this case bars, to the carrier, *any* interest, *"direct or indirect"* in the commodities the carrier hauls to market, so the statute before Mr. Justice White barred any deviation, "directly or indirectly," by the carrier, from the published rate.

The way this Court met the railroad's attempt to escape that prohibition (by delivering coal for a specified price per ton, including transportation) supplies guidance for a reading of the Hepburn Act. The Court saw a clear violation of the Interstate Commerce Act, if:

> "departure from the published rate shall be made, *'directly or indirectly'* * * *." 200 U.S. at 391-392.*

The Court realized:

> "if a carrier has a right to disregard the published rates *by resorting to a particular form of dealing*, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable *to every method of dealing* by a carrier by which the forbidden result could be brought about." 200 U.S. at 392.

Here, as there:

> "It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent." 200 U.S. at 395.

*Emphasis supplied throughout.

The railroad can find no comfort in *United States v. Elgin Joliet & Eastern Railway Co.* (1936), 298 U.S. 492, or *United States v. South Buffalo Railway Co.* (1948), 333 U.S. 771, which the railroad cites (p. 12). From those cases comes the warning of seven Justices of this Court that the Commodities Clause is violated when carrier, producer and shipper are "dominated by the same interest" which makes abuses "easy, and their detection and punishment difficult," 298 U.S. at 506, and that the construction the railroad here argues for, is "in the teeth of the commodities clause" as shown by its legislative history. 333 U.S. 786.

Nor is there help for the railroad in the contract of October 20, 1899 (set forth in the railroad's brief in opposition, A-12) between Great Northern and Lake Superior Company, Limited (owned 75% by James J. Hill, 15% by his son, and 10% by a business associate). That contract gave the railroad such absolute control that it clearly would be invalid under decisions of this Court, such as:

> *United States v. Lehigh Valley Railroad Company* (1911), 220 U.S. 257, where the earlier Mr. Chief Justice White, again speaking for a unanimous Court, refusing to allow (p. 274), "by indirection that which the commodities clause prohibits," considered (p. 273): "Our duty is to enforce the statute and not to exclude from its prohibitions things which are properly embraced within them."
>
> *United States v. Delaware, Lackawanna and Western Railroad Company* (1915), 238 U.S. 516, where Mr. Justice Lamar pointed out (p. 524), "the Commodity Clause and the Anti-Trust Act are not concerned with the interest of the parties but with the interest of the public * * *."

The plain fact is that the contract of October 20, 1899, *had to be terminated.* The railroad had to be completely divorced from the iron ore properties. It was to exclude, as required by the Commodities Clause, *any* interest on the part of the railroad in the ore properties that the Trust was established. This is shown by decisions of courts and by solemn assurance given by the railroad that if it succeeded to the properties, it would have to give them back to James J. Hill. (See Petition, pp. 10-11.)

Here the railroad by judgment of the Supreme Court of Minnesota is adjudged a present interest and ultimate outright ownership of the ore lands. (See Arms Appendix, A17.)

The railroad has a further direct interest therein through tying clauses running into the 1990's requiring the ore to travel to market over its lines. The Trustees proclaim they "have properly assisted such allocation of the traffic," and have done so right "up to this date." (See Petition, p. 6.)

To disguise the effect of the decision under review, as Mr. Justice Clarke put it in *Chicago, Milwaukee & St. Paul Railway Company v. Minneapolis Civic and Commerce Association* (1918), 247 U.S. 490, arguments, such as those advanced by the railroad in this case, are "sheer sophistry" (p. 498) and:

> "the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved * * *." (p. 501)

CONCLUSION

The construction of the Commodities Clause of the Hepburn Act for which the railroad here contends, but which seven Justices of this Court reject, deserves the attention of this Court.

The issue concerns not only the interests of 10,000 certificate holders (whose certificates say the Trust is for their "ratable benefit"), and of Burlington Northern, but of all of the nation's railroads and the public they serve.

Respectfully submitted,

THOMAS V. KOYKKA
WILLIAM S. BURTON
ARTER & HADDEN
1144 Union Commerce Building
Cleveland, Ohio 44115
216-696-1144

JAMES R. OPPENHEIMER
MARK H. STROMWALL
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